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Peter Seitz
*Federal Security Agency*

# SOME ASPECTS OF COVERAGE OF THE SOCIAL SECURITY ACT: WHAT IS "EMPLOYMENT"

PETER SEITZ*

As the Social Security program matures, practicing attorneys find themselves called upon for advice concerning that portion of the program relating to old age and survivors insurance. In many cases, the proper answer requires a careful analysis of the appropriate provisions of the Federal statutes and the rules and regulations of the Social Security Board comparable to the process of ascertaining rights and liabilities arising under a policy of insurance. There are no short cuts or easy paths to the determinations which must be made with respect to such problems. There are other inquiries of a broader nature, however, the answers to which may be found without too much difficulty when the attorney has a sure grasp of fundamental coverage provisions of the Federal statutes and knows where to look for the interpretative materials. It shall be the purpose of this article to outline briefly and broadly those conceptions of coverage which appear to be embodied in the old-age and survivors insurance program and to comment upon the reasons which, apparently, actuated Congress to cover certain groups and classes in the national population and to exclude others.

The remarks which follow, of course, are not authoritative, many conclusions, particularly those with respect to legislative intent, being based upon the mere speculation of the writer. It is widely recognized in Anglo-American law that whenever a statute is subject to construction, the intention of the legislature, always assuming that one existed, can be declared with confidence and finality only by the courts.

## *The Basic Statutory Provisions and the Interpretive Materials Issued by Administrative Bodies*

The Social Security program, insofar as it relates to old-age and survivors insurance, and as presently consti-

* Principal Attorney, Federal Security Agency. The opinions expressed in this article are those of its author exclusively and may not be attributed to the Federal Security Agency or the Social Security Board.

tuted, is legislatively expressed in the Federal Insurance Contributions Act (sub-chapter A of chapter 9 of the Internal Revenue Code, as amended, 26 U.S.C.A. 1400, et seq.)[1] and in title II of the Social Security Act, as amended, (42 U.S.C.A. 401, et seq.). The Federal Insurance Contributions Act levies a tax on employees equal to a stated percentage of "wages"[2] received by them with respect to "employment"[3] (section 1400). The employees' tax is withheld from the payroll by the employer and paid by him to the Collector of Internal Revenue. The Federal Insurance Contributions Act also levies an excise tax upon employers with respect to having individuals in their employ, equal to stated percentages of the wages paid by them with respect to employment

[1] As originally enacted the material of this subsection of the Internal Revenue Code was contained in title VIII of the Social Security Act of 1935. For reasons dictated, in all probability, by implications in the opinions of the United States Supreme Court in United States v. Butler, 297 U.S. 1 (1936) and Railroad Retirement Board v. Alton Railroad Co., 295 U.S. 330 (1935) and because of constitutional uncertainties with respect to the scope and proper exercise of the power of Congress to tax and to provide for the general welfare (U.S. Constitution, Art. 1, section 8) the draftsmen of the Act deemed it prudent not to provide expressly that the funds collected through title VIII should be dedicated to the payment of benefits under title II. The tax and the spending provisions of the old age program were separately held to be valid, in Helvering v. Davis, 301 U.S. 619 (1937), against an attack based upon the theory that, in concert, they represented an unconstitutional exercise of power by Congress. There have been no judicial attacks upon the affinity of the financing and spending features of the old age program since Helvering v. Davis, *supra*, and the controversy for all practical purposes, has been closed.

[2] "Wages" is defined, generally, for the purposes of the Federal Insurance Contributions Act (subchapter A of chapter 9 of the Internal Revenue Code, as amended), title II of the Social Security Act and the Federal Unemployment Tax Act (subchapter C of chapter 9 of the Internal Revenue Code, as amended) as "all remuneration for employment including the cash value of all remuneration paid in any medium other than cash." See Federal Insurance Contributions Act, section 1406 (a); Federal Unemployment Tax Act, section 1607 (b); and title II of the Social Security Act, section 209 (a). The Federal Unemployment Tax Act is the revenue measure which permits credits to taxpayers who have contributed to State unemployment compensation acts which conform to the Federal standards prescribed therein. This act in many of its coverage features is identical with the Federal Insurance Contributions Act. Its constitutionality was affirmed in Steward Machine Co. v. Davis, 301 U.S. 548 (1937). See also Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937).

[3] "Employment" is defined, generally, for the purposes of the two revenue laws and title II of the Social Security Act as "service * * * by an employee for the person employing him." Federal Insurance Contributions Act, section 1426(b); Federal Unemployment Tax Act, section 1609(c); and title II of the Social Security Act, as amended, section 209(b).

(section 1410). A similar excise tax on employers is levied by the Federal Unemployment Tax Act (section 1600). For the purposes of the Federal Unemployment Tax Act, however, "employer" does not include any person unless, among other things, the total number of persons employed by him in employment for a specified period of time was eight or more (section 1607).

Both the Federal Insurance Contributions Act and the Federal Unemployment Tax Act are administered by the Bureau of Internal Revenue which has issued interpretative regulations.[4]

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[4] See Regulations 106 (Part 402, Title 26, Code of Federal Regulations, 1940 Supp.) relating to the Employees' tax and the Employers' tax under the Federal Insurance Contributions Act, U.S. Treasury Dept., Bureau of Internal Revenue, 1940. See also Regulations 107 (Part 403, Title 26, Code of Federal Regulations, 1940 Supp.) relating to the Excise Tax on Employers under the Federal Unemployment Tax Act.

In addition to general regulations, the Bureau of Internal Revenue issues precedent decisions in the Internal Revenue Bulletion, the official publication of the Bureau. These rulings are designated "SST's." In litigation involving the application of State unemployment compensation laws some of which contain coverage and exemption language similar to or identical with the Federal Insurance Contributions Act and the Federal Unemployment Tax Act there has been evidenced a tendency of counsel to rely upon these rulings of the Bureau as being authoritative precedents which should govern judicial disposition of cases involving somewhat analogous facts. In many cases these "rulings" which are merely digests of actual rulings, rendered anonymous by deletion of identifying names, are well conceived and are of great value to taxpayers and administrators. It might be well to observe, however, that the following caveat appears on the face of the Bulletin:

"The rulings reported in the Internal Revenue Bulletin are for the information of taxpayers and their counsel as showing the trend of official opinion in the administration of the Bureau of Internal Revenue; the rulings other than Treasury Decisions have none of the force or effect of Treasury Decisions and do not commit the Department to any interpretation of the law which has not been formally approved and promulgated by the Secretary of the Treasury. Each ruling embodies the administrative application of the law and Treasury Decisions to the entire state of facts upon which a particular case rests. It is especially to be noted that the same result will not necessarily be reached in another case unless all the material facts are identical with those of the reported case. As it is not always feasible to publish a complete statement of the facts underlying each ruling, there can be no assurance that any new case is identical with the reported case. As bearing out this distinction, it may be observed that the rulings published from time to time may appear to reverse rulings previously published."

Indeed, the United States Supreme Court has held that rulings of the Bureau of Internal Revenue not promulgated by the Secretary of the Treasury do not have the force and effect of Treasury decisions and "are of little aid in interpreting a tax statute." See Helvering v. N.Y. Trust Company, 292 U.S. 455, 467, 468 (1934); Biddle v. Commissioner, 302 U.S. 573, 582 (1938); Estate of San-

Title II of the Social Security Act, as amended, which is administered by the Social Security Board, provides for the payment to individuals who have attained the age of 65 of monthly benefits based upon their "average monthly wage" in "employment", and for the payment of supplementary benefits to their wives, over 65, their minor children, dependent parents and widows.[5] The Social Security Board has issued as an interpretation of the Act which it administers, Regulations No. 3 (Part 403, Title 20, Code of Federal Regulations, 1940 Supp.) relating to Federal Old-Age and Survivors Insurance under title II of the Social Security Act, Federal Security Agency, Social Security Board, 1940. The Board, however, has not, as yet, issued any published rulings or interpretations indicating the trend of its decisions comparable to those issued by the Bureau of Internal Revenue in the Internal Revenue Bulletin.

The attention of an attorney engaged in a casual consideration of the program is soon attracted to the circumstance that with regard to the meaning of such key terms as "wages" and "employment", the Bureau of Internal Revenue, for revenue collection purposes, and the Social Security Board, for benefit payment purposes, issue their own independent regulations and rulings. Further inspection will reveal that in all material respects the cited regulations of these respective agencies of the Federal Government, dealing with these provisions, are identical. The regulations themselves, however, are, of course, subject to construction and interpretation, and there is no assurance that these agencies will achieve the same results in their rulings. A determination as to whether certain payments constitute "wages" or whether the performance of certain services evidences the relationship of "employment" depends largely upon the extent of development of the relevant facts. A deficiency of such development in a given case, or a tendency of one agency to give more weight than the other to the criteria of deter-

ford v. Commissioner, 308 U.S. 39, 52 (1939). See also for the attitude of State courts with respect to the weight to be accorded rulings of the Bureau of Internal Revenue as binding precedents, Capitol Building & Loan Assn. v. Kansas Commissioner of Labor and Industry, 148 Kan. 446, 83 P. (2d) 106 (1938); Fidelity-Philadelphia Trust Co. v. Hines, 10 A. (2d) 553 (Pa. 1940).

[5] This broad description comprehends all of the types of benefits payable under title II as amended in 1939. The benefits in the Social Security Act of 1935 were of a much more restrictive nature.

mination outlined in the regulations might well result in opposite conclusions on an identical state of facts. It is doubtful whether the rule of res judicata is sufficiently flexible and elastic to enable a company to claim that an administrative or judicial decision with respect to its Social Security tax liability is determinative of the merits of a claim of its former employee for benefits, or to enable the Bureau of Internal Revenue to claim that an administrative or judicial decision allowing a claim for title II benefits to a former employee of a company is determinative of a suit by the company for refund of the Social Security taxes it had paid. The dichotomy in the Social Security program which resulted from reasonably held constitutional doubts thus presents a situation wherein, theoretically, under identical coverage and exemption provisions, that agency which pays out benefits may reach a conclusion as to whether the relationship of "employment" is present, contrary to that of the agency charged with the collection of the tax. In practice, however, it is believed to be fair to state that such differences of viewpoint with respect to general interpretation and application of the statutes as may have arisen between the two agencies have been minimized and depreciated. A system of coordination of activities and mutual consideration of the problems shared by the Social Security Board and the Bureau of Internal Revenue may have the consequence, ultimately, of dispelling all substantial differences of interpretation.

*The Meaning and Scope of "Employment"*

It will be observed that the payment of the various types of benefits provided for by section 202 of title II of the Social Security Act, as amended,[6] depends upon the identity

[6] Section 202(a) provides for primary insurance benefits (payable monthly) to individuals who are "fully insured" (as defined in section 209(g)) and have attained the age of 65. Section 202(b) provides for monthly payments to a wife of a fully insured individual provided she attained the age of 65, is living with her husband or is regularly supported by him and is not entitled to primary benefits on her own account. Section 202(c) provides for payments to children of individuals entitled to primary benefits or who are fully insured provided they satisfy the statutory test of dependency. Section 202(d) provides for payments to a widow of a fully insured individual living with him at the time of his death or regularly supported by him, when she attains the age of 65 and is not entitled to benefits on her own account. Section

of the claimant as or his relationship to a "fully insured individual" (section 209(g)) or a "currently insured individual" (section 209(b) ). Such individuals are defined as individuals who had been paid "wages" of a specified amount for a minimum specified period. "Wages" in turn is defined in section 209(a) as "all remuneration for employment"; and, finally, "employment" (with certain exceptions thereafter set forth) is defined in section 209(b) as "any service of whatsoever nature, performed . . . by an employee for the person employing him . . . ." Thus, any inquiry as to whether an individual is or will be entitled to benefits depends upon whether he is receiving remuneration for services performed by him as an employee of another.

The employment relationship as the test of coverage of the Social Security program was hardly chosen because that relationship comprehends with satisfactory precision those groups which are most in need of the security afforded by the statute. The employment relation was chosen because, relatively better than any other group concept, it includes those sought to be protected. The statements in the Report to the President of the Committee on Economic Security, the reports of the House and Senate Committees which recommended the legislation to Congress and the statements of the Supreme Court as to the probable Congressional intent are revealing on this point.[7] They disclose that it was

202(e) provides for payments to a widow of an individual who was either fully or currently insured, who was living with her husband at the time of his death and who, at the time she applied for benefits, had, in her case, a child of her husband entitled to child's benefits. Section 202(f) provides for payments to parents of individuals who died fully insured and who were wholly dependent upon such individuals. Section 202 (g) provides for lump sum payments to designated relatives or to individuals bearing funeral expenses on the account of fully or currently insured persons who died after December 31, 1939 leaving no widow, child or parent entitled to a monthly benefit.

No attempt is made in this footnote to set forth all of the qualifying conditions set forth in the cited sections. The reader is referred to the statute and the regulations for that purpose.

The amount of benefit payments depends upon the average monthly wage of the insured individual (section 209(f)), the number of years $200 or more of wages were paid to such individual (section 209 (e)) and other factors set forth in the provisions relating to the various types of benefits.

[7] In Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937), Mr. Justice Stone said at p. 512:
"The character of the exemptions suggests simply that the state has chosen as the subject of its tax, those who employ labor in the processes of industrial production and distribution."

the Congressional purpose to extend the benefits of the Act to the vast number of workers, primarily industrial, whose economic survival rests upon the continuance of an association with an entrepreneur assuring the payment of wages as remuneration for services performed. It was assumed that the individuals in this class and their families were in need of protection against the vicissitudes attending old age and death. It may be that objective criteria might have been devised that would enable an administrative official with greater certainty and dispatch to identify those whom the Congress sought to make secure and to protect against the hazards of old age and unemployment, but the draftsmen of the Act, apparently, came to the conclusion, either that the search for such criteria would be in vain, or that they might best be declared after the program had developed, and experience had indicated where the line should be drawn.

The employment relation, then, was chosen, apparently, not because it was considered the best possible criterion of coverage, but because it appeared the best practicable standard then available. Certainly it cannot be said that it bears any close and necessary relationship to the risk of insecurity attending old age and unemployment or to the risk of insecurity faced by the survivors of the deceased family breadwinner; those risks appear to be common to individuals and to their survivors without regard to the technical legal circumstances under which their services are performed. Penury in old age and insecurity of "employment" in its broadest sense are hazards faced by the factor, the independent contractor, the consignee, the lessee, the dealer, the distributor and the professional man as well as the "servant" at common law.

It appears wholly reasonable and in conformity with should be applied in most tort cases. This is because we our national mores that the rule of *respondeat superior* believe it to be proper and just that he should be held responsible for the damage who controls the actions and conduct of another, performing services for him. This is because the owner of the business, the entrepreneur, the hirer of services is usually, of all the parties concerned, in the best position to minimize the risk of injury to a third person by the installation of safety devices, the prescription

of safety rules, etc. Furthermore, he is probably in the best position to shift or absorb the damage and social loss that has been occasioned.[8] This rationale also justifies placing the burden of workmen's compensation insurance upon the employer (master). In the field of old-age and survivors insurance and in unemployment compensation, however, it is obvious that the factor of "control" which is one of the principal tests of the existence of the master-servant relationship in connection with *ex delicto* or workmen's compensation liability, is entirely irrelevant. The risks and hazards sought to be dealt with in the social security program are neither diminished nor augmented by the exercise or the reservation of the right of "control" by him for whom the services are performed.

It will be observed that the benefits payable are measured by "wages" paid. Title II of the act as well as the Federal Insurance Contributions Act and the Federal Unemployment Tax Act is geared to wage payments. It was obviously contemplated that so-called "self-employed"[9] individuals would not come within its scope. The reasons which would justify the implied exclusion of self-employed individuals are twofold: First, a self-employed individual is frequently thought of as being in a better position to insulate himself against insecurity in old age than the typical wage-earner; profits are more flexible than wages, and afford a better opportunity to the entrepreneur to attain security than to the wage-earner who must depend upon the continuous ren-

[8] See Harper, *The Basis of the Immunity of an Employer of an Independent Contractor* (1935) 10 Ind. L. J. 494; HARPER, A TREATISE ON THE LAW OF TORTS (1933) sec. 291; Steffen, *Independent Contractor and the Good Life* (1935) 2 U. of Chi. L. Rev. 501; Laski, *The Basis of Vicarious Liability* (1916) 26 Yale L. J. 105; Douglas, *Vicarious Liability and the Administration of Risk* (1929) 38 Yale L. J. 584.

[9] "Even with compulsory coverage large groups of workers cannot readily be brought under unemployment compensation; among them employees in very small establishments, and, of course, *all self employed persons.*" (Italics supplied) Report to the President of the Committee on Economic Security, p. 10 (1935).

See also computations and tables in Report No. 628 of Senate Committee on Finance, May 13, 1935 (to accompany H.R. 2760) pp. 26, 27 and Report No. 615, of House Committee on Ways and Means, April 5, 1935 (to accompany H.R. 7260) pp. 14, 15 which indicate that in addition to the specially exclued types of service (agricultural labor, government service, etc.) it was intended by Congress that the individuals not within the coverage of title VIII and title IX of the original act would be "owners, operators, self-employed (including the professions)."

dition of services.[10] Secondly, as a supplement to the system applicable to the wage-earning population of the country, it was originally planned that a voluntary system of old age annuities would be put into execution by the sale to individuals, on a cost basis, of deferred life annuities. In its Report to the President (1935) the Committee on Economic Security stated that "The primary purpose of the [voluntary] plan is to offer persons not included within the compulsory system a systematic and safe method of providing for their old age." This plan, which was to take in the "self-employed", was set forth in title XI of H.R. 7260, but was not, however, enacted as a part of the Social Security Act of 1935.

It becomes evident that in expressing the fundamental coverage concept of title II in terms of employment the framers and enactors of the legislation appeared to be concerned, not so much with "employees" or "servants" in the sense that those terms are used in tort and workmen's compensation cases, as with "labor in the processes of industrial production and distribution,"[11] as distinguished from "self-employed" individuals. This conception expressed, perhaps, not so clearly as might be desired was embodied in Regulations No. 3 (Part 403, title 20, Code of Federal Regulations, 1940 Supp.) of the Social Security Board. It is there stated:

> "Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others *who follow an independent trade, business, or profession, in which they offer their services to the public,* are independent contractors and not employees." (Italics supplied) (Sec. 403.804)

The regulations also contain the statement that:

> "Generally such relationship (employer and employee) exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the

[10] "A considerable part of the population, however, is outside of title II. Included in this excluded group are all agricultural workers * * * all self-employed persons, farmers, professional people, and proprietors and entrepreneurs. These groups include almost half of all persons 'gainfully occupied' as the term is used in the United States Census. Many of these people will not be so greatly in need of old age assistance as the industrial workers to whom title II is applicable, but large numbers are likely to be dependent upon the public in their old age." (Report No. 628, Senate Committee on Finance, May 13, 1935, p. 9).

[11] Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 512 (1937).

> work but also as to the details and means by which that result is accomplished." (Sec. 403.804)

It is believed that it is reasonable to conclude that the regulations justify an interpretation of the term "employment" which would exclude individuals typically self-employed "who follow an independent trade, business or profession in which they offer their services to the public" and that one of the principal tests in ascertaining whether such a situation exists is whether the individual performing the services is subject to a right of control and direction by another, not only as to the result of the work but "as to the details and means" by which it is accomplished.

It may be complained that this unduly subordinates the "control test" in the ascertainment of the employment relationship. The Restatement of the Law of Agency,[12] however, only considers the "control test" but one of eight criteria for the master-servant relationship. Moreover, on historical grounds it has been ably argued by Professor Paul A. Leidy[13] on the basis of the leading and significant case of *Milligan v. Wedge*[14] that the severity of the *respondeat superior* rule of liability which is a rule of absolute liability, was relaxed principally where it was found that the person performing the tortious act did so, not as one who was a part of the principal's business establishment and staff, but as one who held himself out to the public as pursuing an independent calling, profession or occupation. The control test has also been subjected to severe criticism as the exclusive or paramount factor in the ascertainment of the relationship, by Professor Fowler V. Harper,[15] Professor Roscoe T. Steffen[16] and Professor, now Justice William O. Douglas.[17]

On the basis of these studies, the interpretation of the regulations suggested above, would not appear to be unreasonable. Whether it will be adopted, ultimately, by the

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[12] RESTATEMENT, AGENCY (1933) §220.

[13] Leidy, *Salesmen as Independent Contractors* (1930) 28 Mich. Law Rev. 365.

[14] 12 Ad. & E 737 (Q.B. 1840)

[15] Harper, *The Basis of the Immunity of an Employer of an Independent Contractor* (1935) 10 Ind. L. J. 494; HARPER, A TREATISE ON THE LAW OF TORTS (1933) sec. 291.

[16] Steffen, *Independent Contractor and the Good Life* (1935) 2 U. of Chi. L. Rev. 501.

[17] Douglas, *Vicarious Liability and the Administration of Risk* (1929) 38 Yale L. J. 584-604, 720-745.

courts remains to be seen. The litigation respecting the social security program in the Federal courts has not yet been sufficiently extensive to hazard any prophesy whether the courts in social security cases will be able to overcome the natural tendency to fall into the error of using the traditional and familiar criteria for ascertaining whether, for the purpose of determining vicarious liability in tort, the employer-employee relationship exists. The United States District Court in *Kaus v. Huston*[18] evidenced its ability to avoid the mental pitfalls in a case in which the owner of a fleet of taxicabs who allegedly "leased" them to drivers for stated periods at a stated "rental" sued for refund of social security taxes on the ground that the drivers did not perform services in "employment." The court said at p. 331:

> " . . . By narrow technical analysis of such relationship and particularly plaintiff's claimed want of control over the drivers, it is argued that the relationship of master and servant does not exist. It seems to me that this view of the question is too narrow. The real question for solution is, Does the plaintiff engage merely in the leasing of taxicabs, or does he operate a line of taxicabs as a common carrier of passengers? When all factors are considered and particularly the contractual relationship of the plaintiff with the passengers carried, I think there can be little doubt that plaintiff is operating the line of taxicabs, and that while he has adopted an ingenious method of fixing the compensation of his drivers and permits the drivers to exercise some discretion over the cab during the period of the driver's shift, nevertheless I think there is no discretion vested in the drivers inconsistent with the relation of master and servant. From the very nature of the case the drivers, in order to perform their duties properly, must exercise very complete control over the cabs while they have them on their shifts."[19]

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[18] 35 F. Supp. 327 (D.C. Iowa 1940).

[19] Notwithstanding an insistence by some courts that the employment relationship does not exist unless there is shown a right to control the "details" and means by which the desired result is to be accomplished, Luckie v. Diamond Coal Co., 41 Calif. App. 468, 480, 183 Pac. 178, 183 (1919), other courts with, perhaps, a clearer perception of the fundamentals and character of the relation, are satisfied with a showing of a right of "general control" over the activities of the alleged employee. Aisenberg v. C. F. Adams Company Inc., 95 Conn. 418, 111 Atl. 591 (1920); Jack and Jill, Inc. v. Tone, 9 A.(2d)497(Conn. 1939); cf Industrial Commission v. Northwestern Mutual Life Insurance Co., 103 Colo. 550, 88 P. (2d) 560 (1939). The "general control" test, of course, in application, reaches practically the same results as the test of whether the individuals performing services "follow an independent trade, business or profession in which they offer their services

The case has been appealed by the employer to the Circuit Court of Appeals and a decision is expected by the time this article is published.[20] In *Indian Refining Co. v. Dallman*[21] and in *The Texas Co. v. Higgins*[22] in which the oil company plaintiffs sought refund of social security taxes paid with respect to services performed by bulk station operators, however, a more restrictive approach with emphasis upon the "control test" was evidenced by the respective courts.

In *The Texas Company* case, furthermore, Judge Learned Hand speaking for the Circuit Court of Appeals said:

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to the public" (Regulations No. 3 of Social Security Board, section 403-804) inasmuch as it is only those who are free of the "general control" of those for whom services are performed who may be said to follow an independent trade, etc.

Furthermore, it is of interest to note that adoption of either of these tests as distinguished from the test of control as to the "details" of performance, tends to result in a recognition of the employment relation where services are necessarily performed under conditions which require discretion with respect to "details" to be lodged in the alleged employee. The language from Kaus v. Huston, quoted above, is evidence of this tendency, and in Allied Mutuals Liability Co. v. DeJong, 209 App. Div. 505, 205 N.Y. Supp. 165 (1924) in which an industrial homeworker was held to be an employee within the scope of the State workmen's compensation law, it was said:

"One may be sent into a forest to fell trees, or be sent to his home to sew garments, and in either case be none the less an employee. If the employer chooses to order work so done as to waive supervision, this does not make the employee less an employee." (p. 167) See also Fischer v. Industrial Commission, 301 Ill. 621, 629, 134 N.E. 114, 117 (1922); Andrews v. Commodore Knitting Mills Inc., 257 App. Div. 515, 13 N.Y.S. (2d) 577, 579 (1939).

[20] A similar approach was evidenced by the Supreme Court of Errors of Connecticut in Robert C. Buell & Co. v. Danaher, Conn. 18 A. (2d) 697 (Conn. 1941) in which it was held, under the Connecticut unemployment compensation law which defines "employment" in terms of the existence of the master-servant relationship, that security salesmen for a brokerage partnership were "servants." The court said at p. 699:

"'On the whole the work which the salesmen are doing is the business of the plaintiff. The advancement of that business depends very largely upon the method and manner of the doing of their work by the salesmen. It is therefore highly essential to the plaintiff that it have the right to control the conduct of its salesmen in the doing of its business and it accordingly must be inferred in reason that it is implicit in the contract of hiring the salesmen that the plaintiff does have that right. And certainly the plaintiff has the power to enforce that right in that it holds over the salesmen the threat of discharge if they do not do their work to the satisfaction of the plaintiff.'"

[21] 31 F. Supp. 455 (S.D. Ill. 1940) (*aff'd.*, C.C.A.7th, 1941).

[22] 118 F. (2d) 636 (C.C.A. 2d, 1941) *aff'g* 32 F. Supp 428 (S.D.N.Y. 1940).

" . . . the act appears to take over the term as the common law knew it, and at common law they would not be employees."

Although the rules for the ascertainment of the employment relationship in New York (where the case was tried and the alleged employer was situated) and in Virginia (where the alleged employee performed his services) may not differ materially, reference to "the common law" as a governing standard may result in opening up a Pandora's box of questions as to conflicts of laws in other cases. Furthermore, it was clearly stated in *Erie Railroad Company v. Tompkins*[23] "there is no federal general common law" and that "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." If Judge Hand meant to refer to the common law of the State, the effect of his decision, it seems, would be to import into the social security program a diversity of rules and a lack of uniformity of standards of coverage which could hardly have been intended in a national program.[24]

On the other hand, if Judge Hand meant to refer to a Federal common law of "employment", what of Mr. Justice Brandeis' declaration of its non-existence? It may be considered to be unfair, of course, to subject a casual and unfortunate expression in a judicial opinion to the test of syllogistic logic which is carefully rigged to demonstrate its absurdity. The view may be taken that, in referring to the "common law", Judge Hand meant those decisions of the Federal courts antedating the enactment of the Social Se-

[23] 304 U.S. 64, 78 (1938)

[24] For the purpose of ascertaining familial relationships (wife, widow, child, or parent of an insured individual) Congress specified that the Social Security Board should apply "such law as would be applied in determining the devolution of interestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death, or if such insured individual is or was not so domiciled in any State, by the courts of the District of Columbia." Social Security Act as amended, section 209(m); Regulations No. 3, Social Security Board, section 403.829. Congress, therefore, clearly evidenced its intention that State rules should be determinative as to designated issues of coverage. Its failure to refer to State rules with respect to "employment" may, therefore, be taken to mean that it intended uniform application of one national rule. Lyeth v. Hoey, 305 U.S. 188, 194 (1938); Burnet v. Harmel, 287 U.S. 103, 110 (1932); Morgan v. Commissioner of Internal Revenue, 309 U.S. 78, 80 (1940); Helvering v. Hallock, 309 U.S. 106, 118 (1940); National Labor Relations Board v. Waterman Steamship Co., 309 U.S. 206, 219 (1940).

curity Act involving the scope of the relationship of "employment" and of "employer" and "employee" which Congress had in mind on the occasion of its passage. Unfortunately, this rationalization is partially affected by the circumstance that aside from a very few cases such as *Singer Sewing Machine Co. v. Rahn*,[25] and cases involving the construction of those terms as they appear in statutes,[26] there has been no satisfactory development and adjudication of the meaning of "employment", "employer" and "employee" by the Federal courts.[27] In that event, it would appear that the correct interpretation of those terms as they appear in the Social Security Act depends upon the administrative and judicial determination of the legislative intention—the ascertainment of those individuals whom Congress believed to be most in need of protection against the hazards of old age and death[28] and the payment of benefits to whom would serve the general welfare.

In other words, the use of these terms in the Social Security Act does not necessarily bind its interpreters to the construction of similar terms in other statutes designed to remedy other mischiefs and enacted for other purposes.[29] The interpreters, it is believed, are free to cover such groups in their general regulations and rulings as would appear to them to have been comprehended by the legislative intention, even though under a Federal common law judicially declared to be non-existent, and under State court decisions dealing with other problems and matters, individuals sim-

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[25] 132 U.S. 518 (1889).

[26] "Statutes have been passed in which the words 'servant' and 'agent' have been used. The context and purpose of the particular statute controls the meaning which is frequently not that which the same word bears in the Restatement of this subject." RESTATEMENT, AGENCY (1933) (comment on sec. 220 d).

[27] "Where the term 'employee' has been used in statutes without particularized definition it has not been treated by the courts as a word of definite content." U.S. v. American Trucking Associations, Inc., 310 U.S. 534, fn. 29 (1940).

[28] International Stevedoring Co. v. Haverty, 272 U.S. 50 (1926); South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251 (1940).

[29] "The word ['employee'] of course, is not a word of art. It takes color from its surroundings and frequently is carefully defined by the statute where it appears." (U.S. v. American Trucking Associations, Inc., 310 U.S. 534, 545 (1940).
"That the word 'employees' is not treated by Congress as a word of art having a definite meaning is apparent from an examination of recent legislation" (citing, among other statutes, the Social Security Act). (U.S. v. American Trucking Associations, Inc., 310 U.S. 534, fn. 29 (1940).

ilarly circumstanced might not have been considered to be in employment.

The employment relation referred to in the Social Security Act is not easily defined and described by reference to tort cases or to workmen's compensation cases. In those cases, the term "independent contractor" is too frequently used as a mere label indicating non-liability of a principal for the infliction of a specific wrong even though the general relationship of employment might otherwise exist between the wrongdoer and the principal.[30] For social security purposes, in view of its taxing and benefit features, it is necessary to know whether the *general status* of employment exists. Knowledge that at a particular instant of time the individual performing services proceeded on a frolic and detour and went beyond the scope of his employment or knowledge as to the extent of "control" by the alleged employer over the instrumentality that occasioned a tort is of no assistance in determining tax liability or benefit entitlement which must necessarily depend upon a "flow-of-time"

[30] Compare, Standard Oil Co. v. Anderson, 212 U.S. 215 (1909); American Savings Life Insurance Co. v. Riplinger, 249 Ky. 83, 60 S.W. (2d) 115 (1933); Weslowski v. John Hancock Mutual Ins. Co., 308 Pa. 117, 162 Atl. 166 (1932).

For example, S, a distributor of the D Company's products who uses his own automobile, with the Company's approval, causes an injury to P due to his negligence. A court might reach the conclusion that at the moment of the impact S was not engaged in the business of the D Company, or that the D Company did not reserve, in the contract of employment, a right to control the operation of the car. This conclusion will usually be articulated by using the label "independent contractor," which, in turn, indicates the nonapplicability of the doctrine of respondeat superior. In other words the D Company is not liable to P in damages.

In all other respects, however, and excepting for the circumstances appertaining to the particular accident, it is fair to assume that S was and continues to be an employee of the D Company and not an independent contractor. Certainly it is difficult to understand why an adjudication of rights in the tort action should militate against S's claim when, upon attaining the age of 65, he applies for old age benefits based upon services in the employ of the D Company.

The irrelevance of the concept "independent contractor" in legislation with a particular social purpose was clearly recognized by the Supreme Court of Indiana in McDowell v. Duer, 78 Ind. App. 440, 133 N.E. 839 (1922) in which a timber cutter for a hoop manufacturing company was held to be an "employee" within the meaning of a workmen's compensation law. The court said at p. 840:

"The doctrine of 'independent contractor' is peculiar to the law of negligence, and we are not aware that it is appropriate to any other branch of the law. Certainly it has no place in the law of workmen's compensation. We will eliminate that term, therefore, from further consideration."

conception. Regard for the remedial purposes of the program requires the adoption of an interpretation and construction of "employment" which will be practicable and workable and will achieve the legislative intention by bringing the benefits of the act to those who, it was believed, are in need of them. It is felt that emphasis upon the factor of the absence of an independent calling or business rather than upon the "control test" meets those requirements. It is by application of such a criterion that most "wage earners" will be covered, and most "self-employed" excluded from the benefits of the act and, of course, from the operation of the appropriate provisions of the Internal Revenue Code. There is no clear line of demarcation, however, between the fields of coverage and non-coverage, and it is doubtful whether the ingenuity of bill-drafters is sufficient to devise objective criteria which will clarify the existing uncertainties. The program is in the hands of the courts, and it is their construction of the statutory language that will determine its future. The only prophesy that can be made with confidence is that if the courts are restrictive in their interpretation of "employment"[31] legislative amendments will be demanded by the people of this country to expand the coverage of the Social Security Act and to express the criteria of coverage in terms other than a formula of relevance and

[31] Liberal construction, of course, does not contemplate a perversion of the provisions of the act: it calls for an interpretation, in doubtful cases, harmonious with the legislative intention rather than one based upon supposed analogies in previously decided cases. Thus, in connection with the canons of construction applicable to the Indiana workmen's compensation act, it was said in Dietrich, et al. v. Smith, 93 Ind. App. 219, 176 N.E. 636 (1931):

"It was undoubtedly the humane purposes which were sought to be incorporated into our law, and the correction of some evils then existing, that prompted the Legislature to enact the 'Workman's Compensation Act'. So the courts have held that such laws should be liberally construed, in order that the purpose of their enactment should not be thwarted, 'even to the inclusion of cases within the reason although outside the letter of the statute.' Furthermore: 'This court is committed to the proposition that in construing the legislative definition of "employee" a measure of liberality should be indulged in, to the end that in doubtful cases an injured workman or his dependents may not be deprived of the benefits of the humane provisions of the compensation plan.' Columbia, etc., Co. v. Lewis (1916) 63 Ind. App. 386, 115 N.E. 103; In re Duncan (1930) 73 Ind. App. 270, 127 N.E. 289, 291; McDowell v. Duer (1922) 78 Ind. App. 440, 133 N.E. 839, 841; Calumet, etc., Machine Co. v. Mroz (1922) 79 Ind. App. 305, 137 N.E. 627; National Power, etc., Co. v. Rouleau (1924) 81 Ind. App. 585, 144 N.E. 557; Dowery v. State (1925) 84 Ind. App. 37, 149 N.E. 922; Fey v. Bobrink (1926) 84 Ind. App. 559, 151 N.E. 705." (p. 637)

use only in the field of tort law. It may be anticipated, perhaps, that some restrictive interpretations will result from litigation involving the taxing provisions; however, when the benefit claims denied by the Social Security Board are appealed to the courts, a swing in the other direction may likewise be anticipated.

The treatment by the courts of this great social program which assures security to wage-earners in their old age and to their dependents after death is worthy of the continued interest of every practicing lawyer. The law is being interpreted in the courts today. That law as interpreted will affect the lives and happiness of millions of our people.